Supreme Court, U.S.
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No. 96-703

In The

Supreme Court of the United States

October Term, 1996

JIMMY MERCHANT AND HERMAN SANTIAGO,
Petitioners,

vs.

MORRIS LEVY, BIG SEVEN MUSIC CORP., ROULETTE RECORDS, INC. AND WINDSWEPT PACIFIC ENTERTAINMENT CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MORRIS LEVY, BIG SEVEN MUSIC CORP. AND ROULETTE RECORDS, INC.

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QUESTION PRESENTED FOR REVIEW

Whether the three year statute of limitations contained in the 1909 Copyright Act, 17 U.S.C. § 115(b), bars an action seeking a declaratory judgment declaring that Petitioners are co-authors of a musical composition commenced in 1987, more than three years after the musical composition was copyrighted in 1956 and was publicly exploited continuously since January 1956 by third parties who the Petitioners allege are not the authors or co-authors of the musical composition?

RULE 29.6 LISTING

The parent company of Respondents Big Seven Music Corp. and Roulette Records, Inc. is ABZ Music Corp. ABZ Music Corp. does not have any nonwholly owned subsidiaries.

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Respondents Morris Levy, Big Seven Music Corp. and Roulette Records, Inc. (the "Levy Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari that seeks review of the opinion of the United States Court of Appeals for the Second Circuit. The opinion is reported at 92 F.3d 51 (2d Cir. 1996) and is reprinted in the Appendix of the Petition for Certiorari.

STATUTE INVOLVED

Section 115(b) of the Copyright Act of 1909, 17 U.S.C. § 115(b), provides:

> § 115. Limitations.
>
> (b) Civil actions.
>
> No civil action shall be maintained under the provisions of this title unless the same is commenced within three years after the claim accrued.

STATEMENT OF THE CASE

A. Nature Of The Case

This is an action to determine the co-authorship and co-copyright ownership of the musical composition "Why Do Fools Fall In Love" (the "Song") commenced on October 7, *1987.*

Distilled to its essence, the Complaint alleges that Petitioners co-authored the Song in *1955* and that the Levy Respondents or their predecessors in interest publicly and commercially wrongfully exploited the Song since *1956* as co-authors and co-owners of the copyright in the Song without

paying royalties to Petitioners. The relief sought is a declaratory judgment that Petitioners are co-authors of the Song and co-owners of the copyright to the Song and a judgment for damages equal to the amount of royalties allegedly wrongfully collected and not paid to Petitioners as a result of the Levy Respondents' exploitation of the Song.

All of Petitioners' claims and rights are based upon the allegation that they co-authored the Song with Frankie Lymon in 1955.

B. The Relevant Factual Background

i. The Recording And Public Release Of The Song

The Song was written in 1955. It was recorded by the musical group publicly known as Frankie Lymon and the Teenagers in or about December 1955 in New York. Petitioners were members of the Teenagers along with Frankie Lymon, Joe Negroni and Sherman Garnes.

The Song was publicly released and distributed on a phonograph record in January 1956 by Gee Records and published by Patricia Music. Both companies were owned by George Goldner. The Song was a number 1 hit in 1956 and sold over 1 million copies.

ii. The Copyright Owners Of The Song

Petitioners never filed an application for copyright in the Song. Petitioners are not the registered owners of the copyright in the Song. On February 13, 1956, the copyright for the published version of the Song was obtained. The copyright certificate of registration for the Song, which has been publicly available in the Copyright Office since February 13, 1956, lists

Frankie Lymon and George Goldner as the authors of the Song. At this same time, Frankie Lymon granted Patricia Music and Gee Records the right to exploit his copyright interest in the Song.

In 1964, George Goldner sold his interest in Gee Records and Patricia Music to Respondent Morris Levy. As a result, Respondent Morris Levy acquired the rights of George Goldner, Gee Records and Patricia Music to the Song. Thereafter, the Levy Respondents commercially exploited the Song.

In 1964, the public copyright records were amended to indicate that Respondent Morris Levy was a co-author of the Song in place of George Goldner. This amendment was based upon Respondent Morris Levy's purchase in 1964 of all of George Goldner's rights in the Song.

Thus, by 1964, as a result of Respondent Levy's purchase of George Goldner's rights in 1964 the Levy Respondents were commercially exploiting the Song as the owners of the entire copyright.

In 1965 and 1966, the Levy Respondents independently acquired the entire interest of co-author Frankie Lymon in the Song.

On September 16, 1988, the Levy Respondents sold their interest in the Song to Respondent Windswept Pacific Entertainment Co. ("Windswept"). Since that sale in 1988, Respondent Windswept has been commercially exploiting the Song.

iii. Petitioners' Unexcused Delay In Commencing This Action And The Resulting Prejudice To The Levy Respondents[1]

In the District Court below, there was no dispute that due to death of critical witnesses, fading memories and missing documents and physical evidence, the Levy Respondents were seriously prejudiced in preparing and presenting their defense.

Most of the potential witnesses to the actual writing of the Song were dead well before the trial of this action. Frankie Lymon, an undisputed co-author of the Song died in 1968. (A-205). In 1970, George Goldner, a co-author listed on the copyright certificate, who was in the studio at the time of the recording of the Song, also died. (A-171; 205). About a decade prior to the commencement of this action, the two remaining members of the original Teenagers, Sherman Garnes and Joe Negroni died, respectively, on February 26, 1977 and September 5, 1978. (A-127; 205-06). Jimmy Wright, the band leader and saxophone player during the 1955 recording session of the Song was also dead by the time the action was commenced. (A-171; 206). In addition, in 1990, Morris Levy, who was listed as the copyright owner of the Song from 1965 on, died. (A-124).

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1. "App. followed by page numbers" refers to pages in the Appendix attached to the Petition for Certiorari.

"(A- followed by page numbers)" refers to pages in the Appendix in the Second Circuit Court of Appeals.

"Resp. Br." refers to the Brief of the Levy Respondents in the Second Circuit Court of Appeals in support of their appeal.

"Pet. Br." refers to the Brief In Opposition of the Petitioners to the Brief of the Petitioners submitted to the Second Circuit Court of Appeals.

By the time this action was commenced in 1987, the 1955 recording session tapes (A-212-14), pieces of paper allegedly with the words and music in the author's handwriting and the love letters that allegedly were a basis for the Song, were no longer available. (A-102; 139 164-65 183; 185-86).

Over the course of the years 1956 to 1987, more than a million publicly distributed copies of the Song credited George Goldner and Frankie Lymon, not Petitioners, as the authors. (A-320; 328-29). Petitioners were fully aware of these credits. (A-172; 187). However, Petitioners never complained to the Levy Respondents about the credits. (A-187; 255; 273).

In September or October 1979, Petitioners were informed by Jeri Spencer of the Copyright Service Bureau, that according to the records of the Copyright Office, Petitioners were not the copyright owners of the Song. (A-119-120; 257; 312-315). In 1981, this information was reconfirmed to Petitioners by Clark Marcus, a lawyer retained by Petitioners. (A-120-21; 316-19).

On September 27, 1984, Emira Lymon, Frankie Lymon's widow, filed an action in the Southern District of New York claiming that Frankie Lymon was the sole author of the Song. (A-148; 199). Petitioners were fully aware of this action. (A-148; 199). In fact, in 1984, Petitioners were also represented by the same lawyer as Emira Lymon. (A-18; 19; 61; 147-48).

It is undisputed that between January 3, 1956, when the Song was publicly released (A-110), and October 7, 1987, when this action was commenced (A-18), Petitioners never commenced any legal action seeking to establish their claim to be co-authors of the Song or demanding author's royalties. (A-144; 149; 179).

C. The Relevant Proceedings And Disposition Below

i. The District Court

In the District Court, the Levy Respondents made a pretrial motion to dismiss the case on the ground of the statute of limitations. The District Court denied the motion. App. 56a-65a. The grounds for denial included the District Court's conclusion that a jury question existed as to whether the statute of limitations was tolled. App. 61a.

In the District Court, the trial of the case was bifurcated. App. 6a. The issue of who were the co-authors of the Song with Frankie Lymon was tried to a jury. App. 24a; 27a. The jury found that Petitioners were co-authors of the Song with Frankie Lymon. App. 27a.

With respect to the issue of tolling the statute of limitations, the trial court reversed the jury finding of a threat sufficient to toll of the statute of limitations on the ground of duress because the claim "fails as a matter of law" and such claim was "against the overwhelming weight of the evidence." App. 41a; 42a. The District Court held that Petitioners "may only pursue those damages which accrued within three years of this lawsuit." App. 43a.

ii. The Second Circuit Court Of Appeals

In the Circuit Court, the Levy Respondents argued, *inter alia,* that the if action was governed by the Copyright Act, the claim for a declaration of authorship was barred by the 3 year statute of limitations contained in 17 U.S.C. § 115(b) of the 1909 Copyright Act. Resp. Br. Point II.

The Second Circuit agreed with the Levy Respondents and

dismissed the action based upon the three year Copyright Act statute of limitations. App. 3a. The Circuit Court specifically held:

> We hold that plaintiffs claiming to be co-authors are time-barred three years after accrual of their claim from seeking a declaration of copyright co-ownership rights and any remedies that would flow from such a declaration. . . . (Citation omitted).

App. 13a-14a.

In reaching this holding, the court below reasoned as follows:

> A cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised. . . . The jury found that Plaintiffs were charged with knowledge of their claim as of 1961, the year they attained the age of majority. Thus, Plaintiffs' claim accrued in 1961, but they did not initiate suit until 26 years later. Though Plaintiffs contend on appeal that the statute was tolled, the basis for such tolling, duress, did not arise until 1969, ending in 1984. By 1969, however, the three-year statute of limitations had long since expired. (Citation omitted).

App. 12a-13a.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS DID NOT PREVIOUSLY RAISE THE POINTS NOW RAISED AND THE COURT OF APPEALS DID NOT CONSIDER THE NEWLY RAISED POINTS.

Petitioners raise two principal grounds in support of their petition.[2] First, the Circuit Court's interpretation of the statute of the Copyright Act's statute of limitations "frustrates the Constitutional mandate limiting copyright protection to authors". Petition at 7. Second, an alleged conflict in the circuit courts "as to whether a state or federal statute of limitations should apply to co-ownership claims." *Id.* at 8. Neither of these grounds were raised in the Court of Appeals or District Court below and were not considered by either of the courts below. Petition at 7, 10, 14, 16, App. 1a-67a. Petitioners have not demonstrated any extraordinary circumstances that would impel this Court to consider for the very first time their newly confected arguments.

In fact, Petitioners have not been completely candid with this Court. In the courts below, Petitioners vigorously argued that the claim for declaration of authorship and ownership of the copyright in this action was governed by the Copyright Act's statute of limitations as construed in *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992), *cert. denied*, 508 U.S. 906 (1993). Now, however, in a complete about face, Petitioners argue that "the

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2. Petitioners also present two secondary arguments: (i) that there is an interest in preserving the integrity of the Copyright Office records which justifies an unlimited right to obtain a declaration of true authorship and (ii) the application of the statute of limitations in this case is contrary to lower court precedent. Petition at 10-11. Neither of these points were raised in or considered by the courts below. As discussed in Points IV and V hereafter, neither point is meritorious.

issues of ownership [are] to be governed by *state-law*". (Emphasis added). Petition at 15.

Under these circumstances, this Court should not, for the first time in this case, consider the issues now raised in this Court by Petitioners which were not raised before nor considered by the courts below. *See, e.g., Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147-48 n .2 (1970) and cases cited therein ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. . . ." (citations omitted)). Accordingly, the Writ for Certiorari should be denied.

II.

THE COPYRIGHT ACT STATUTE OF LIMITATIONS IS CONSTITUTIONAL.

Petitioners' first argument in support of their Petition is that the interpretation of the Copyright Act statute of limitations by the Circuit Court below as limiting a claim for a declaration of authorship to three years from the date that the claim accrued renders the statute unconstitutional. Petition Point I at 8-10. This contention is without merit.

Petitioners do not contend that Congress exceeded its constitutional authority by enacting a statute of limitations in the Copyright Act. *Id.* They maintain, however, that any interpretation of that statute which in any way limits the time period in which an "author" may make a claim to establish his or her status as an "author" under the Copyright Act is unconstitutional. No direct authority is cited for this argument.

The portion of the Constitution relied upon by Petitioners specifically provides that "Congress shall have Power . . . to promote the Progress of Science and useful Arts, *by securing*

for limited Times to Authors . . . the exclusive right to their respective Writings. . . ." (Emphasis added). U.S. Const. Art. 8, § 8, cl. 8. Thus, the Constitution specifically grants Congress the power to place *time limits* on the scope of an author's exclusive rights. Nothing in the Constitution limits Congress' power to determine when the cut-off of the "authors" benefits under the Copyright Act will occur.[3] *Cf. Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The congressional statute of limitation is definitive.").

Plainly, a statute of limitations curtailing the right of an "author" to obtain the benefits of the Copyright Act is permissible within this specific constitutional grant of power. *A fortiori*, the constitutionally permissible statute of limitations will, at some point, cut off the "author's" rights to obtain the benefits accorded to an "author" under the Copyright Act.

Petitioners portray the Circuit Court's interpretation of the statute of limitations as barring a claim for declaration of authorship to a copyrightable work as being an absolute 3 years. However, under the Circuit Court's interpretation of the Copyright Act statute of limitations, the date of accrual of the claim for statute of limitations purposes is subject to equitable doctrines of tolling such as fraudulent concealment and equitable estoppel and legal principles applicable to tolling based upon duress. App. 13a. Thus, in an appropriate case, an "author" will be able to maintain his or her declaratory claim even though more than three years have passed since the work was created.

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3. Congress could have carved out an exception to the statute of limitations for authorship claims. However, it did not do so in either the 1909 or 1976 Copyright Acts. 17 U.S.C. § 115(b) (1970); 17 U.S.C. § 507(b) (1995). In view of the specific constitutional grant of the power to Congress to limit the time of copyrights, it would be a violation of the Constitution and the doctrine of separation of powers for this Court to create a judicial exception by adopting Petitioners' interpretation.

The expansive interpretation of the Copyright Act statute of limitations urged by Petitioners would grant an "author" the right to seek a declaration of copyright ownership at any time during the life of the copyright. Consequently, under Petitioners' view, a claim of authorship for copyright purposes could be made during the putative author's entire lifetime plus 50 years or, in the case of a joint work, the life of the last surviving author plus 50 years. 17 U.S.C. § 302(a) (term of copyright under the current Copyright Act is "the life of the author and fifty years after the author's death."); 17 U.S.C. § 302(b) (term of joint work copyright under the current Copyright Act is "the life of the last surviving author and fifty years after such last surviving author's death.").

Indisputably, the unlimited time period urged by Petitioners would be contrary to and violate the limited constitutional grant of power to Congress to "*secur[e] for limited Times to Authors* . . . the exclusive right to their respective Writings. . ." (Emphasis added). U.S. Const. Art. 8, § 8, cl. 8. With respect to declaratory judgment claims seeking a declaration of authorship of a copyrightable work, Petitioners' interpretation would vitiate the statute of limitations. Moreover, Petitioners' interpretation would create

> the anomaly of a distinct class of actions subject to no limitation whatever, — a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions.

Campbell v. City of Haverhill, 155 U.S. 610, 616 (1895). Petitioners have not provided any authority or articulated any genuine and substantial public policy reason why authorship claims should be governed by such an exceptional rule.

An *unlimited* right to make a claim for declaration of authorship would undermine well settled public policy underlying legislative determinations embodied in statutes of limitations.

> Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them' . . . . These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. . . . (Citations omitted).

United States v. Kubrick, 444 U.S. 109, 117 (1979). The expansive and unlimited rule urged by Petitioners would nullify these well settled and fundamental public policies.

Furthermore, under Petitioners' proposed rule, putative authors would have a great incentive to delay bringing their claims until after large amounts of money have been spent by others developing a work and making it successful and key witnesses or unfavorable evidence becomes unavailable. Public policy does not favor opening the door to such claims and permitting another to reap all of the benefits without any risk in the face of the great potential for fraud and miscarriage of justice.

Therefore, the three year statute of limitations contained in 17 U.S.C. § 507(b) of the current Copyright Act and 17 U.S.C. § 115(b) of the 1909 Copyright Act are constitutional. The determination by the Circuit Court below that the plain meaning of the Copyright Act statutes of limitation limit declaratory judgment actions seeking a declaration of authorship in a copyrightable work to actions commenced within three years after the claim accrued does not render these statutes unconstitutional.

Accordingly, Petitioners have not raised a constitutional question. Therefore, the Writ of Certiorari should be denied.

III.

THE CONSTITUTION DOES NOT LIMIT COPYRIGHT PROTECTION TO "AUTHORS".

Petitioners next argue that "the Copyright Law expressly limits copyright protection in a work to its true authors." Petition at 9. This claim is unfounded.

Contrary to Petitioners' contention, it is clear that the Copyright Act specifically permits copyright ownership and protection to a variety of persons who are not "true authors".

The term "author" is not defined in either the 1909 Copyright Act or the current Copyright Act. 17 U.S.C. § 1 *et seq.* (1970); 17 U.S.C. § 101 *et seq.* (1995). However, this Court has stated as follows concerning the definition of "author" in the context of copyright:

> While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional

> sense, has been construed to mean an 'originator,' 'he to whom anything owes its origin.' (Citation omitted).

Goldstein v. California, 412 U.S. 546, 561 (1973). Using the *Goldstein* definition of "author", it is absolutely indisputable that for copyright purposes persons other than "authors" can own copyrights and are entitled to the protection of the Copyright Act.

The current Copyright Act provides in relevant part:

> (1) The ownership of copyright may be transferred in whole or part to anyone by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.
>
> (2) . . . The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d)(1-2).[4] Thus, under these provisions, a person who is not the "true author" may obtain copyright protection and exercise the exclusive rights of copyright owners.

Therefore, there is no legitimate basis for Petitioners' claim that the Copyright Act protections are expressly limited to "true authors".

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4. Petitioners do not claim that these statutory provisions are unconstitutional.

IV.

THE INTEREST OF PRESERVING THE INTEGRITY OF THE COPYRIGHT OFFICE RECORDS DOES NOT JUSTIFY AN UNLIMITED RIGHT TO OBTAIN A DECLARATION OF AUTHORSHIP.

Petitioner further argues that an author should have an *unlimited* right to obtain a declaration of authorship in order to insure that the Copyright Office records are "complete and accurate as possible". Petition at 10-11.

More specifically, Petitioners claim that because Respondent Morris Levy was not the "true author" of the Song[5], allowing the Copyright Office records to list him as the author of the Song justifies an unlimited right to bring a proceeding to correct the records and thereby protect the integrity of the records. *Id.*

It is not necessary for notice purposes or the integrity of the Copyright Office records, as contended by Petitioners, to give putative authors or authors an unlimited right to obtain a declaration of authorship.[6]

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5. However, it was not disputed that Respondent Morris Levy was a co-owner of the copyright in the Song. Mr. Levy obtained his rights by virtue of his acquisition of George Goldner's rights from co-author Frankie Lymon in 1964 and his independent acquisition in 1965 of rights directly from Frankie Lymon. (A-126, 233-35, 242-47, 271, 303-11).

6. With respect to the duration of copyright, third parties are fully protected because the copyright records will indicate an author thereby permitting the third parties to determine the duration of the copyright. 17 U.S.C. § 409(2) (an application for copyright registration shall include "the name and nationality or domicile of the author or authors, and if one or more of the authors is dead, the dates of their deaths").

(Cont'd)

Petitioners' argument ignores principal concerns of the Copyright Act. "[P]redictablity and certainty of copyright ownership" are paramount goals of the 1976 Copyright Act. *Community For Non-Violence v. Reed*, 490 U.S. 730, 749 (1989). Consequently, in furtherance of these goals, the *ownership* of the copyright, as opposed to the *authorship* of the copyrighted work, is the critical element of the registration and notice provisions of the current Copyright Act. The distinction is very significant. It is only the "owner of copyright" (who may or may not be the author) who is granted the exclusive rights to exploit the copyright under the current Copyright Act. 17 U.S.C. § 106 (granting the "owner of copyright" specifically enumerated exclusive rights in copyrighted work). Under the rule advocated by Petitioners, however, Copyright Office records concerning either authorship or ownership would *not* be reliable or certain. Putative authors and authors could raise authorship and ownership claims at any time during the life of the copyright. Petitioners' proposed rule would actually nullify the notice feature of copyright registration and render uncertain the status of copyright ownership during the life of the copyright.

Additionally, as explained above, the interpretation urged by Petitioners would vitiate the Copyright Act statute of limitations with respect to authorship claims. Point II, *supra*.

(Cont'd)

In this case the Song was copyrighted under the 1909 Copyright Act in 1956. Because the copyright to the Song was in its first term on January 1, 1978, the copyright was entitled to be renewed only for "a further term of 47 years". 17 U.S.C. § 304(a). Thus, whether or not Petitioners are listed as authors in the Copyright Office records, since the term of the copyright in this instance is not measured by the lives of the authors, the term of the copyright to the Song will not be effected by the listing or omission of Petitioners as authors in the Copyright Office records.

Accordingly, the alleged interest of the Copyright Office in preserving the integrity of its records as asserted by Petitioners is not a ground for creating a judicially made exception nullifying the Copyright Act statute of limitations in cases of claims for a declaration of authorship in a copyrightable work.

Therefore, the Writ of Certiorari should be denied.

V.

THE APPLICATION OF THE STATUTE OF LIMITATIONS BY THE CIRCUIT COURT IN THIS CASE IS NOT CONTRARY TO PRECEDENT.

Petitioners maintain that the decision of the Circuit Court below is contrary to "a century of precedent". Petition at 11-12. This claim is totally unfounded.

Petitioners dc not cite any case prior to 1994 in which a court was expressly requested to apply the Copyright Act or any other statute of limitations to a claim for a declaration of authorship. The sole case cited by Petitioners in support of their argument is *Jackson v. Axton*, 25 F.3d 884 (9th Cir. 1994). Petition at 12.

In *Jackson*, the court specifically declined to decide the case under the statute of limitations. *Id.* at 887, n. 2. The court found that the action was barred by the doctrine of laches. Thus, *Jackson* is inapposite and does not support Petitioners' argument.

The only two reported cases in which the applicability of the Copyright Act statute of limitations to a claim for a declaration of authorship was raised and decided are *Merchant v. Levy*, 92 F.3d 51 (2nd Cir. 1996) and *Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996), *petition for cert. filed,* 65 U.S.L.W.

3085 (U.S. July 10, 1996).[7] Under both decisions, Petitioners' claim is time barred. *Id.*

Consequently, Petitioners' claim that the decision of the Circuit Court is contrary to "a century of precedent" is baseless.

Therefore, the Writ of Certiorari should be denied.

VI.

THE APPLICATION OF THE STATUTE OF LIMITATIONS BY THE CIRCUIT COURT IN THIS CASE DOES NOT CREATE A CONFLICT IN THE CIRCUITS.

Petitioners' last argument is that the decision of the Circuit Court below created a conflict in the circuits concerning the application of the Copyright Act statute of limitations to claims seeking a declaration of authorship. Petition Point II. This argument is meritless.

In support of their argument, Petitioners cite *Goodman v. Lee*, 78 F.3d 1007, *cert. denied*, __ U.S. __, 117 S. Ct. 166 (1996) as creating a conflict in the circuits concerning the applicable statute of limitations to cases seeking a declaration of authorship. Petitioners' reliance on *Goodman* is totally misplaced.

Goodman did *not* involve the question of the statute of limitation applicable to the claim for declaration of authorship. Rather, in pertinent part, that decision was limited to the interpretation of the applicable statute of limitation for the

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7. In the District Court in this action, in an unreported decision, District Judge Vincent Broderick held that "the three year statute of limitations provided in 17 U.S.C. § 507(b) is applicable to both of plaintiffs' [Petitioners'] claims and that these claims did not accrue until plaintiffs [Petitioners] knew or had reason to know of the injury that is the basis of this action." App. 56a.

remedy of an accounting *after* it was already determined that the plaintiff was a co-author of the song in issue in that case. 78 F.3d at 1012. *Goodman* determined that the Louisiana state statute of limitations applied to the common law remedy of an accounting between co-owners of copyright. *Id.* This holding was consistent with well settled precedent holding that an action for damages between co-owners of copyright is limited to an accounting under state law. *See Oddo v. Reis*, 743 F.2d 630, 633 n. 2 (9th Cir. 1984); *Korman v. Iglesias*, 736 F. Supp. 261, 265 (S.D. Fla. 1990); *Harrington v. Mure*, 186 F. Supp. 655, 658 (S.D.N.Y. 1960); *Jerry Vogel Music Co., Inc. v. Miller Music, Inc.*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1st Dept. 1947), *aff'd*, 299 N.Y. 782, 87 N.E. 2d 681 (1949); *Kapplow v. Arelard Schulman Limited*, 21 Misc. 2d 306, 193 N.Y.S. 2d 931 (Sup. Ct. N.Y. Co. 1959); *Mountain States Properties v. Robinson*, 771 P.2d 5, 7 (Col. App. 1988). Consequently, *Goodman* is totally inapposite concerning the applicability of either the state or federal statute of limitations to a declaratory judgment action seeking a declaration of authorship to a copyrightable work.

Therefore, contrary to Petitioners' claim, *Goodman* does *not* create a conflict in the circuits concerning the statute of limitations applicable to claims seeking a declaration of authorship.

The only two circuits that have ruled directly on this issue are in *agreement* that the federal Copyright Act statute of limitations applies to such claims. *Merchant v. Levy*, 92 F.3d 51 (2nd Cir. 1996); *Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 10, 1996).

Accordingly, there is no bona fide ground for granting the Writ of Certiorari based upon the alleged conflict in the circuits.

CONCLUSION

There is no constitutional question involved.

There is no conflict among the federal circuit courts.

There is no conflict between any lower court decision and Supreme Court precedent.

There is no important issue of federal law with practical consequences that requires resolution by the Supreme Court.

Therefore, and based upon the foregoing, the requested Writ of Certiorari should be *denied.*

Respectfully submitted,

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